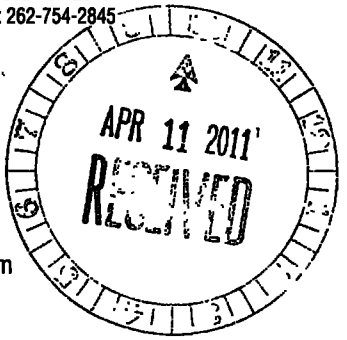
229177

DEWITT
ROSS & STEVENS S.C.
LAW FIRM

www.dewittross.com

Capitol Square Office
Two East Mifflin Street
Suite 600
Madison, WI 53703-2865
Tel 608-255-8891
Fax 608-252-9243

Metro Milwaukee Office
13935 Bishop's Drive
Suite 300
Brookfield, WI 53005-6605
Tel 262-754-2840
Fax 262-754-2845



John Duncan Varda
Capitol Square Office
608-252-9311
jdvarda@dewittross.com

April 8, 2011

Via Federal Express

Surface Transportation Board
Attn: Docket No. EP 705
395 E. Street S.W.
Washington, DC 20423-0001

RE: The Mercury Group Initial Comments
Competition in the Railroad Industry, No. EP 705

Greetings:

Enclosed for filing are the original and ten (10) copies of "Initial Comments of The Mercury Group."

A duplicate of this letter and return mail envelope, postage prepaid, is enclosed for your stamped verification of receipt.

Your kind assistance is very much appreciated. If there are any problems or question in regard to the filing, please contact the undersigned.

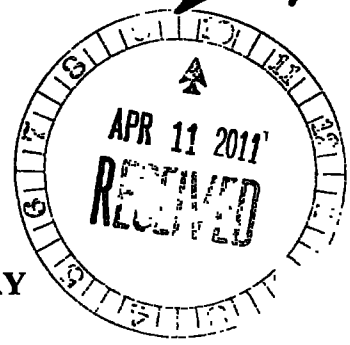
Sincerely,
DEWITT ROSS & STEVENS S.C.

John Duncan Varda

JDV:mc/mso

Enclosures

229177



BEFORE THE
SURFACE TRANSPORTATION BOARD

COMPETITION IN THE RAILROAD INDUSTRY

STB Docket No. EP 705

INITIAL COMMENTS OF THE MERCURY GROUP
A Shipper-Based Mobile Energy Study Group

John Duncan Varda
Attorney for The Mercury Group

Of Counsel
DeWitt Ross & Stevens s.c.
2 E. Mifflin St., Ste. 600
Madison, WI 53703
Tel. 608-252-9311
Fax. 608-252-9243
jdvarda@dewittross.com

Dated: April 8, 2011
Due: April 12, 2011

TABLE OF CONTENTS

BEFORE THE
SURFACE TRANSPORTATION BOARD

COMPETITION IN THE RAILROAD INDUSTRY

STB Docket No. EP 705

INITIAL COMMENTS OF THE MERCURY GROUP
(A Shipper-Based Mobile Energy Study Group)

IDENTIFICATION OF THE MERCURY GROUP

The Mercury Group is a shipper-based mobile energy study group focused on best practices and market innovations to reduce the energy consumption, energy costs and emissions associated with the movement of products to market. The Mercury Group was organized in 2008 and operated under the auspices of Breakthrough Fuel LLC ("BTF") and traditional shipper association antitrust compliance guidelines. The Mercury Group's participants include market leading companies across the consumer goods industry, food industry, paper industry, retail, building products, manufacturing and machinery industries.

Breakthrough Fuel LLC works with shippers to understand, manage and reduce the amount and cost of energy used to move their products to market. This begins by providing market transparency throughout the shipper's mobile energy life cycle, enabling an understanding of the unique energy consumption, energy cost and emissions associated with its product movements. With this

understanding, BTF and the shipper work to develop and execute strategies focused on reducing the amount and cost of energy consumed and the mobile emissions that occur in the movement of the shipper's products to market. Since 2005, BTF has been the innovator in mobile energy life cycle management. BTF has been awarded US Patent, No. 7.729,998, *Method for Shippers to Manage Fuel Costs* for its fuel surcharge replacing "Fuel Recovery Program."

INITIAL COMMENTS – IN SUMMARY

Fuel is now and will continue to be the most volatile component of railroad operating expenses. Railroad industry-wide reliance on indexed fuel surcharges, whether percent-of-revenue or mileage based, creates pervasive distortions in the state of competition in the railroad industry. Shippers are being asked to pay for fuel costs that have virtually no relationship to the freight they are shipping. This economic distortion is now part of virtually every freight transaction and makes for an ineffective marketplace. Consideration of competitiveness in the railroad industry, including the potential impacts of any proposed changes to the Board's access rules and policies requires and the financial health of the industry, requires consideration both captive and non-captive freight and industry fuel surcharge practices.[1]

[1] In the course of responding to questions from the Board the February 24, 2011 hearing in *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, Docket No. EP 704, AAR economist, Prof. Robert Willig, conceded that fuel volatility and railroad industry fuel surcharge practices negatively impact the accurate and timely measuring revenue/variable cost ratios. The citation omitted because the transcript of the hearing was not available at the time of preparation of these Initial Comments.

INITIAL COMMENTS

To Explore the Current State of Competition in the Railroad Industry Requires Consideration of Both Captive and Non-Captive Freight.

The Board's Notice of January 11, 2011 opening this Docket begins by saying that its purpose is:

> [T]o explore the current state of competition in the railroad industry and possible policy alternatives to facilitate more competition, where appropriate.

Id., at p. 1. In its invitation to comment, the Board goes on to say:

> This proceeding is intended as a public forum to discuss access and competition in the rail industry, and **with a view to what, if any, measures the Board can and should consider to modify its competitive access rules and policies**; whether such modification would be appropriate given changes over the last 30 years in the transportation and shipping industries; the effects on rates and services these rules and policies have had; and the likely effects on rates and service of changes to these policies.

Id., at p. 5 (emphasis added). The Board itemizes seven focal areas for comment, four of which (alternative through routes, terminal facilities access, reciprocal switching agreements, and bottleneck rates) are very specifically related to the Board's access rules and policies but three of which (financial state of the railroad industry, access pricing and impacts of proposed changes in the Boards access rules and policies) necessarily involve much broader consideration of competitiveness in the railroad industry not only for captive freight but for non-captive freight as well.

At the outset of the February 24, 2011 hearing in *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, Docket No. EP 704, Chairman Elliott remarked that some forty percent (40%) of railroad industry revenue, some $20 billion per year, is derived from exempt, hence

non-captive, freight. Moreover, many in the public sector, such as the chairman of the House Transportation and Infrastructure Committee, Rep. John Mica, R-Fla., believe that changing the "competitive balance between railroads and trucks" – *i.e.*, increasing the percentage of revenue the railroad industry derives from non-captive freight – is a critical component of the Nation's transportation policy:

> "My goal would be to get more trucks off of the highway, and more cars off of the highway," Mica told The Journal of Commerce. That would save motor fuel and highway wear and tear at the same time, he said. "Four out of every five dollars for transportation now goes just for maintaining infrastructure," he said. By diverting more traffic to trains and making better use of existing highway corridors, the U.S. would "not only stop sitting on the (highway) asset but stop wrecking the asset."

The Journal of Commerce, 1/17/2011. Rep. Mica's view is not isolated. It has been held by many in the public sector (federal, state and local) for many years.

The impacts of any proposed changes to the Board's access rules and policies, thus, requires and will increasingly require, consideration of the state of competition in the railroad industry for both captive and non-captive freight. The extent to which captive freight bears the burden of differential pricing is a function of the railroad industry competitiveness for non-captive freight and is directly related to the current access rules and polices and any changes in the current access rules and policies. Principles and policies for access pricing, to accompany any changes in current access rules and policies, cannot be accurately assessed and

calibrated absent consideration of the state the railroad industry's competitiveness for non-captive freight.

Current Rail Industry-Wide Fuel Surcharge Practices Distort Market Competitiveness and Block Accurate Assessment of the Impact of Potential Changes in the Board's Access Rules and Policies.

Fuel is now and will continue to be the most volatile component of railroad operating expenses. Railroad industry-wide reliance on indexed fuel surcharges, whether percent-of-revenue or mileage based, creates pervasive distortions in the state of competition in the railroad industry. Shippers are being asked to pay for fuel costs that have virtually no relationship to the freight they are shipping. This economic distortion is now part of virtually every freight transaction and makes for an ineffective marketplace.

It is easy to understand how we got to where we are today. When fuel costs first spiked – and Fuel Surcharges were initiated – transparency was impossible. Information and technology were not available to provide transparency and the ability to manage fuel was neither important nor possible.

But that is not today's marketplace. Fuel prices are high – and getting higher – and greatly impact the competitiveness of a shipper's products. Technology now exists that makes complex transactions routine and inexpensive. And, credible fuel market information is immediately available.

Today, transparency of fuel costs is no longer theoretical, it is

available. And with this new found transparency, comes the opportunity for a more effective, competitive marketplace. But the key is that the payment for fuel costs – between the shipper and the carrier – be based on actual fuel market conditions and not an artificial index.

And when shippers are able to see, understand and pay the Railroads for the real price of fuel used to move their products, they can make informed decisions and improve the competitiveness of their products. In a transparent market, a shipper will:

- See the benefits – and differences – between different transportation modes. For the first time shippers are able to understand the gallons, the emissions and market fuel costs of their transportation decisions;
- See the impact of using more efficient carriers, shipping from different locations and using alternative fuels;
- Be able to understand the impact of decisions on their carbon footprint, where, in today's marketplace, reducing emissions can be a competitive advantage.

In total, shippers will have the necessary information about fuel to make decisions that make their products more competitive. In today's economy, it is important to enable our domestic shippers to better compete in the global marketplace.

How does Energy Life Cycle Transparency Relate to the State of Competition in the Railroad Industry?

The benefits of transparency are not exclusive to the shippers. When the Railroads are paid accurately for the fuel costs they incur to move freight, competitive marketplace functions more efficiently. Simply put, what is the benefit of being a more fuel efficient mode if it's not visible to those choosing which mode to ship? What is the benefit of better fuel economy and lower emissions if those factors cannot be accurately calculated by those using the service? Transparency connects the benefits with the decisions, and the most efficient mode and carrier – most often the railroad – will benefit.

Further, transparency creates the opportunity for shippers and their transportation providers to move from being adversaries – which is inevitable in today's Fuel Surcharge environment – to collaborators focused on how best to manage fuel, the most volatile of all transportation costs.

Fuel Surcharge and Reasonable Practice.

In *Rail Fuel Surcharges*, STB Ex Parte No. 661, decision 1/25/2007, the Board was unequivocal in its finding rate-based fuel surcharges to be misleading and an unreasonable practice:

> [T]he term "fuel surcharge" most naturally suggests a charge to recover increased fuel costs associated with the movement to which it is applied. **If it is used instead as a broader revenue enhancement measure, it is mislabeled.** This sort of mislabeling appears designed to avoid the type of response a carrier would likely receive if it were to honestly inform a shipper that a higher rate was being imposed to recover not only the increased fuel cost of serving that shipper, but also the increased cost of fuel for another shipper's traffic – which is what

> would often occur under rate-based fuel surcharges. . . . **We believe that imposing rate increases in this manner**, when there is no real correlation between the rate increase and the increase in fuel costs for that particular movement to which the surcharge is applied, **is a misleading and ultimately unreasonable practice.**

Id., p. 7 (emphasis added). Although the Board concluded not to implement a proposal to extend its ruling to exempted traffic, its conclusion was predicated on certain factual assumptions (*i.e.*, based on decades old "prior findings") about the marketplace based on the record before it in 2007 in Ex Parte No. 661:

> We are persuaded by the comments that we should not implement this aspect of the August proposal. The exemptions are based on prior findings that there is a sufficiently competitive market for the transportation involved that regulatory protections are not needed. The exemptions permit the traffic involved (including intermodal traffic) to benefit from a competitive marketplace free of regulatory interference. **Under the exemption, trucks and railroads compete on an equal footing for intermodal traffic, for example, with each competitor capable of adapting readily to changes in the marketplace. If we revoke the exemption, even partially, the railroads would be restricted in how they can respond to changes, while trucking companies would not.** This kind of imbalance could have unintended consequences and upset the competitive balance between railroads and trucks.

Id., p. 13 (emphasis added). The Board's factual assumption is that the Exemptions – "based on [decades old] prior findings" – make "each competitor capable of adapting readily to changes in the marketplace" and that, even in the event of a partial revocation, "the railroads would be restricted in how they can respond to changes" in the marketplace.

Investigation of the advent of marketplace alternatives to the indexed fuel surcharge and the extent of adoption of such alternative in the railroad industry will challenge the Board's prior

findings and permit it to replace assumptions about the relation of the Exemptions, competitiveness in the railroad industry, fuel surcharges and the marketplace with findings of fact based on conditions in the present day marketplace and the projected marketplace of the future in which rail market share for non-captive freight increases dramatically.

Fuel Surcharge – It's Not Just About "Labels" Anymore.

In *Rail Fuel Surcharges*, STB Ex Parte No. 661, decision 1/25/2007, the Board focused particularly on labels and "mislabeling" as an unreasonable practice. Although the Board wisely chose not to prescribe an index, the Board did go so far as to encourage use of a particular index:

> While we encourage carriers to use the EIA Index, we will not mandate its use. We are concerned that we not hinder the Board's ability to respond nimbly should a superior index be identified.

Id., p. 11. Likely because the Board was not presented evidence of marketplace alternatives to indexed fuel surcharges, the Board, also, found:

> We do not believe that it is necessary or appropriate at this time to adopt any of the other linkage suggestions made by the commenters, as summarized above, such as requiring railroads to separately identify the fuel cost component in their base rates.

Id., p. 10.

An investigation of the adverse impacts of indexed fuel surcharges and of marketplace alternatives (described below) will demonstrate that the indexed fuel surcharge issue and timeliness of the response of the

Nation's Rail Network to such marketplace alternatives is not merely a question of unreasonable practice in "labeling." Rather, the indexed fuel surcharge issue and timeliness of the railroads' response to marketplace alternatives has broader, substantive implications for the national "Rail Transportation Policy" and the relationship of the Exemptions, at issue in Docket EP 704, and the present state of competitiveness in the railroad industry, at issue in this Docket, EP 705.

Indexed Fuel Surcharges Block Energy Life Cycle Transparency.

Fuel surcharge programs, which have been the transportation industry standard for decades, normally use an index, such as the U.S. Department of Energy's "Energy Information Administration On-Highway Diesel Fuel Retail Price Index" ("EIA Index" or "DOE Index"). While the EIA Index can provide base trend information on retail diesel prices, it does not provide any direct relationship to the energy used by a shipper's freight movement or the fuel costs experienced by the transportation carrier.

The indexed fuel surcharge approach, whether employed for truck, intermodal or rail freight movements, does not allow for the visibility or understanding necessary for shippers to effectively manage this important cost component in the movement of their products. The problem created by this lack of transparency occurs on several levels:

Fuel surcharges block informed decision making. Fuel surcharge programs, and in particular, percentage-of-revenue based programs, do not

enable the shipper to know the amount of energy that is consumed in the movements of their products. As such, fuel consumption is not part of the shipper's decision process in key supply chain management decisions that could benefit from this understanding. Decisions such as ship location selection, distribution center siting, carrier selection, network design and mode selection, all of which would benefit from an understanding of fuel consumption, necessarily exclude energy from the decision process. This lack of understanding, and no clear metrics, makes improvements in energy consumption very challenging for shippers.

Fuel surcharges block management of emissions and carbon foot print. Lack of visibility to fuel consumption also makes it difficult to understand the emissions associated with freight movements. While some distance-based models exist for calculation of mobile carbon footprints or emissions, they are approximations at best. To accurately calculate a shipper's mobile carbon footprint, visibility to the amount of energy used in the movement of products is necessary. Without visibility to their carbon footprint, it is difficult for shippers to develop and employ strategies for carbon reduction.

Fuel surcharges inhibit use of renewable and alternative fuels. Lack of visibility to a shipper's carbon footprint also inhibits strategies for the inclusion of renewable and alternative fuels into their supply chain. Without clear understanding and metrics around energy use and emissions, the potential market advantages of alternative fuels are hidden; and it

becomes difficult, if not impossible, to create a business case for change.

Fuel surcharges perpetuate economic distortions. Indexed fuel surcharges also mask the real cost of fuel and creates economic distortion for virtually every freight movement. This economic distortion exists in multiple levels:

- ***Timing.*** The EIA Index is published once-per-week although actual fuel prices update daily. As a result, and by design, the economic distortion increases each of the six days after the publish date. Further, on weeks with national holidays or when the DOE office is closed (for weather of other reasons), the distortion can extend beyond the six-days and grow even larger.
- ***Geography.*** Virtually all indexed fuel surcharges use a national average fuel price although real fuel prices vary significantly by geography. A 500-mile movement, leaving from Columbus, OH, would experience very different fuel costs depending on whether it was headed to New York, Georgia or Missouri. This not only creates challenges for transportation carriers – and wide variances in how effectively they are reimbursed for actual fuel costs – but also hides the business impacts of fuel price differences and inhibits carriers and shippers from making decisions in their own economic interests. Using national averages also can have unintended consequences, such as masking market efficiencies in states or regions that would enhance their competitive position. It

also can place artificial stresses on infrastructure whereby decisions which would normally be based on market economics are made without consideration of the underlying efficiencies of the market.

- ***Fuel Taxes.*** Similar to the geographic distortion, using national averages also creates tax-related economic distortion as well. Not only is there a wide variance of on-highway diesel fuel tax rates by states, there is a much wider variance between rail-related taxes by state. And further, since intermodal fuel surcharges typically use the EIA On-Highway Index, there is even greater distortion between fuel surcharges and the actual costs incurred by the transportation carrier.
- ***Retail Prices.*** The EIA Index uses a sampling of posted-retail diesel fuel prices for its price determination although most commercial transportation fuel is purchased at significant discounts with both retail discount price programs and cost-plus price programs.

The combination of these factors – all creating economic distortions which layer on each other – creates a significant and widely varying difference between the economics represented by the indexed fuel surcharge and the actual fuel market costs.

The inability of indexed fuel surcharges to provide information or understanding of fuel costs, consumption or emissions prevents shippers

from making rational decisions regarding the energy used in the movement of their products. It also creates artificial market behavior and distorts economics in certain public policy areas.

Energy Life Cycle Transparency Is Important to Competitiveness.

Energy is becoming an increasing important consideration in the competitiveness of the shipper's products, of the transportation carrier's services and of several related stakeholders such as alternative fuels industry, as well as individual communities and states.

For the shipper, energy is becoming an increasingly significant segment of overall costs of moving products to market. As such, effective energy life cycle decisions can directly impact both the economic and market competitiveness of the shipper's products. Making better decisions, however, requires that there be energy transparency and quality information.

When a shipper has transparency of key energy information – the energy consumed by the freight movement, the cost of energy consumed and the carbon emissions of the movement – then, the shipper can actively manage fuel in a manner to enhance its competitive position. For example:

- Including fuel efficiency in freight routing decisions, inclusive of both transportation mode and transportation carrier;
- Considering fuel costs and fuel taxes in ship location decisions, both for individual freight movements or when siting ship locations;

- Engineering freight networks focused on reducing unnecessary miles and eliminating fuel wasted through empty miles, inefficient routes or excessive idle behavior;
- Creating collaborative programs – between shippers and carriers – to develop initiatives focused on reducing consumption and fuel costs;
- Leveraging information to negotiate fuel discounts to reduce the overall price of fuel; and
- Converting select movements to alternative transportation fuels to reduce fuel costs or transportation emissions.

The ability to make these decisions, and many others, is enabled through fuel information transparency which strengthens competitiveness of shipper's products in the marketplace.

Transportation carrier services, and their market competitive position, are also enhanced with effective fuel information transparency. To accomplish this, two conditions are necessary: (a) full transparency of fuel information must be available and; (b) reimbursement for fuel, between the shipper and the carrier, must be based on the actual fuel information provided by the transparency. Once those two conditions are met, then, the information is used to:

- Eliminate additional line-haul pricing that carriers typically add to rates to protect them from times when the economic distortions (discussed previously) are to their disadvantage. Elimination of

this "waste" enables carriers to more competitively price their services.

- Enable fuel efficient providers and modes to effectively market their services and obtain the benefit of their fuel efficiency. Existing programs average all providers to an industry norm and, as a result, the more fuel efficient providers do not gain the full value of their advantageous performance.
- Create a level playing field for carriers. Currently, carriers with the greatest market leverage, typically the larger carriers, can obtain fuel price discounts unavailable to the majority of carriers; and they can leverage this fuel price advantage to create an artificial price advantage.
- Allow transportation providers and modes the ability to reliably present their energy management – cost and emissions – to the marketplace and allow the more efficient providers to effectively gain market share.

Simply, whether the carrier is a truck/drayage provider or a rail/intermodal provider or an all-highway or all-rail provider, transparent fuel information allows energy efficient carriers and modes to present this information to the marketplace in a reliable, credible manner. Given both the marketplace and public policy environments, it is likely that the more efficient providers will gain a competitive advantage and, in the process, allow shippers to get their products to market more competitively.

In addition, there are several stakeholder groups that will benefit from fuel information transparency. By way of example:

- The alternative fuels industry, which should benefit from market and public sentiment for reduced emissions and renewable fuels, is at a disadvantage with the current fuel surcharge methods. When shippers have the ability to make decisions on energy costs and emissions, it is likely that alternative fuels will become more competitive.
- States which have lower fuel prices and taxes would benefit from energy market transparency. Currently, all fuel costs and taxes are blended into a national average. This creates an unintended advantage for high cost states whose costs are not accurately reflected in the marketplace. On the opposite side, states with lower fuel costs and taxes are currently disadvantaged because their natural advantage is not apparent to the decision makers at the shippers. Another example of this lies in the 2008 period when fuel prices spiked dramatically. Select states offered fuel tax reductions to allow products to move to markets more economically. In this case, however, the producers/shippers in those states gained no advantage because the tax changes were masked by the fuel surcharge programs.
- Consumers will benefit from the increased information and improved decisions enabled by fuel information transparency.

Alternatives to the Fuel Surcharge Provide Real Transparency.

Fortunately, the marketplace currently has alternatives to fuel surcharges that provide fuel information transparency and enables the important economic advantages discussed above.

As an example, BTF's Fuel Recovery Program enables accurate fuel information to be provided on individual intermodal freight movements. It accomplishes this by:

- Breaking the intermodal movement into its unique segments: truck drayage and rail movement;
- Determining the fuel economics on each of the individual truck movements including the distance (miles), fuel economy (mpg), market fuel costs unique to the movement and actual fuel taxes required by the movement, calculated and updated daily; and
- Determining the fuel economics on the individual rail segment including the distance (rail miles), rail fuel economy (ton miles), market fuel costs unique to the movement and actual rail fuel taxes required by the movement, calculated and updated daily.

As a result, the BTF process provides information – to both the shipper and the transportation carriers – such as:

- The fuel consumed by the individual freight movement;
- The fuel costs directly associated with the freight movement; and
- The carbon emissions created by the freight movement.

This information is currently used:

- By shippers and carriers to understand the actual fuel costs associated with each unique freight movement;
- By shippers to reimburse transportation providers for the fuel costs incurred on the individual movement;
- By carriers to use in bidding and pricing line-haul rates;
- By shippers to assess competitive carrier bids – allowing a true comparison of total costs (line-haul and fuel) – in many cases, for the first time;
- By shippers to assess competitive mode alternatives – allowing for a true comparison of total costs (line-haul and fuel) – in many cases, for the first time;
- By shippers to assess competitive facility alternatives – such as distribution center locations – on a total cost basis;
- By shippers to understand their fuel market risk and design fuel risk programs based on actual gallon consumption and market exposures, in many cases, for the first time;
- By shippers to calculate their carbon footprint – and understand emissions – in many cases, for the first time; and
- By shippers and carriers to assess the economic and environmental impacts of alternative and renewable fuels – and to advance those impacts to the broader marketplace.

The capability to provide fuel information transparency – and the above uses – exists today. BTF currently processes over 5 million unique

freight movements annually from across North America. Transactional expense is borne by the shipper not the railroad or other carrier.

A Study of Current Fuel Market Behavior and the Relationship to Current Intermodal Fuel Surcharge Programs Illustrates the Harm to Railroad Industry and Intermodal Competitiveness.

The Mercury Group recently conducted an analysis of actual intermodal movements – across multiple shippers, multiple Intermodal Marketing Companies ("IMCs") and multiple railroads. The underlying railroads included the BNSF, CSX, Norfolk Southern and the Union Pacific.

In total, the study included 184,674 intermodal freight movements across the United States. The study population included only movements whose length-of-haul (LOH) was between 1,000 and 2,000 miles, was 'dry freight' (not requiring temperature control containers) and covered the period between January 1, 2010 and March 17, 2011.

The baseline of the study was rooted in the actual marketplace behavior of fuel. To understand fuel market behavior, we looked at three unique benchmarks:

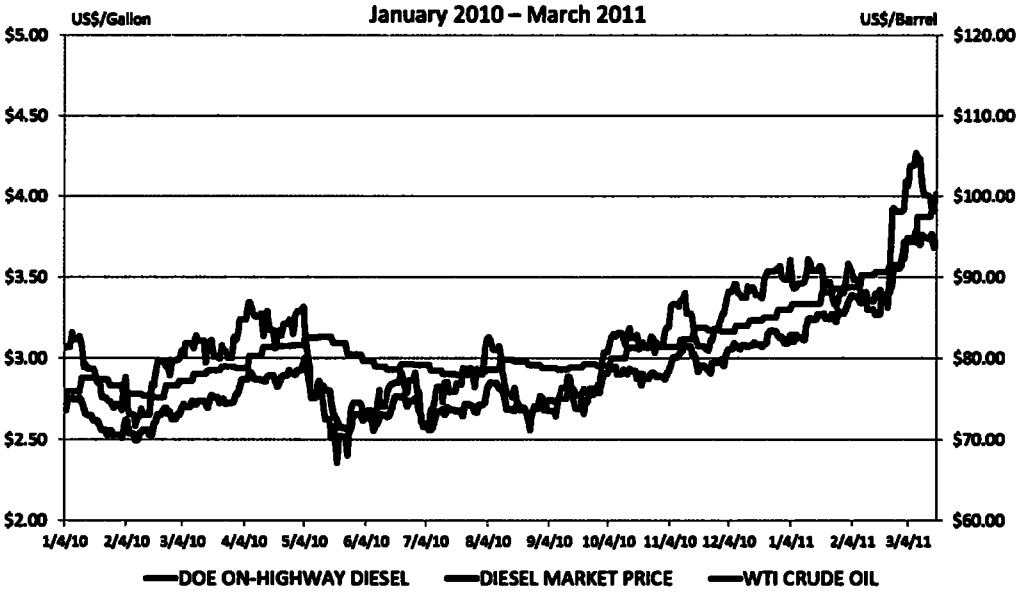
- DOE On-Highway Diesel ("DOE" index, a/k/a EIA Index): The weekly published on-highway average price for ultra-low sulfur diesel ("ULSD") fuel taken from a survey of 350 fuel stop locations and presented at full retail pricing.
- Diesel Market Price: A daily average price for ULSD taken from a population of 7,500 fuel stop locations across the United States

and presented at a typical purchase price for a well-managed trucking company.

- WTI Crude Oil: The daily average price for WTI Crude Oil which is published by NYMEX and presented in cost-per-barrel (http://www.cmegroup.com/company/nymex.html).

The prices for these three benchmark fuels – presented from January 1, 2010 through March 17, 2011 – can be seen on Chart 1:

CHART 1
DIESEL FUEL & OIL MARKET PRICE BEHAVIOR
January 2010 – March 2011



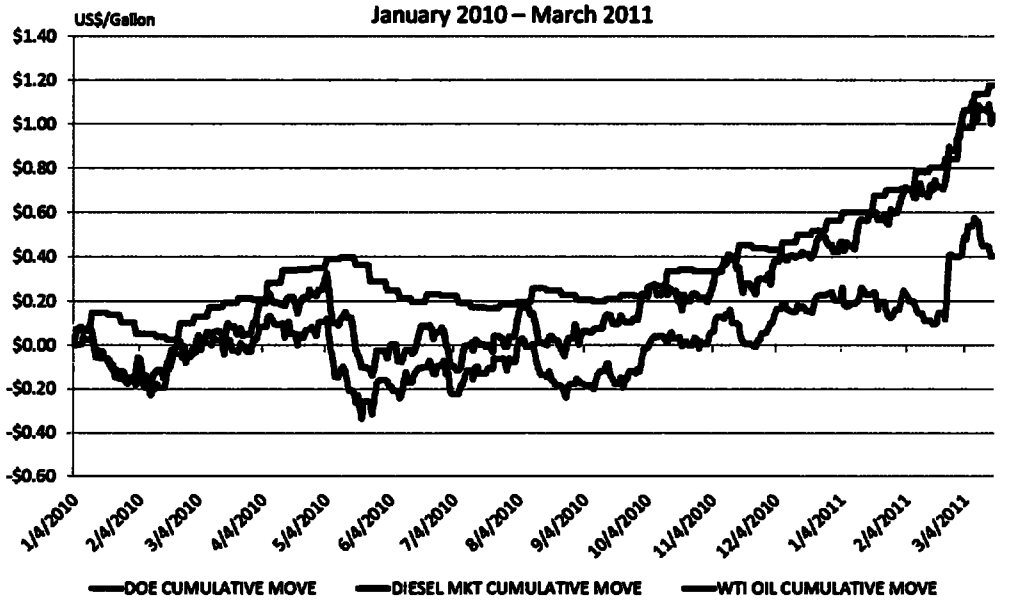
If we analyze the movement in pricing over this time period, among each of these three benchmarks, we see that:

- The DOE has increased $1.176/gallon over this time period.
- DOE Market Price has increased $1.037/gallon over this time period.

- WTI Crude Oil has increased $19.00/barrel (or an equivalent $0.452/gallon based on 42 gallons = 1 barrel).

This fuel market behavior can be seen on Chart 2:

CHART 2
DIESEL FUEL & OIL MARKET PRICE CHANGE BEHAVIOR
January 2010 – March 2011



While we included WTI Crude Oil pricing as a benchmark, given that refined product moved more rapidly than the underlying crude oil over this period – and that diesel is the predominant fuel for both truck and rail movements – our analysis continues only with ULSD pricing as a benchmark.

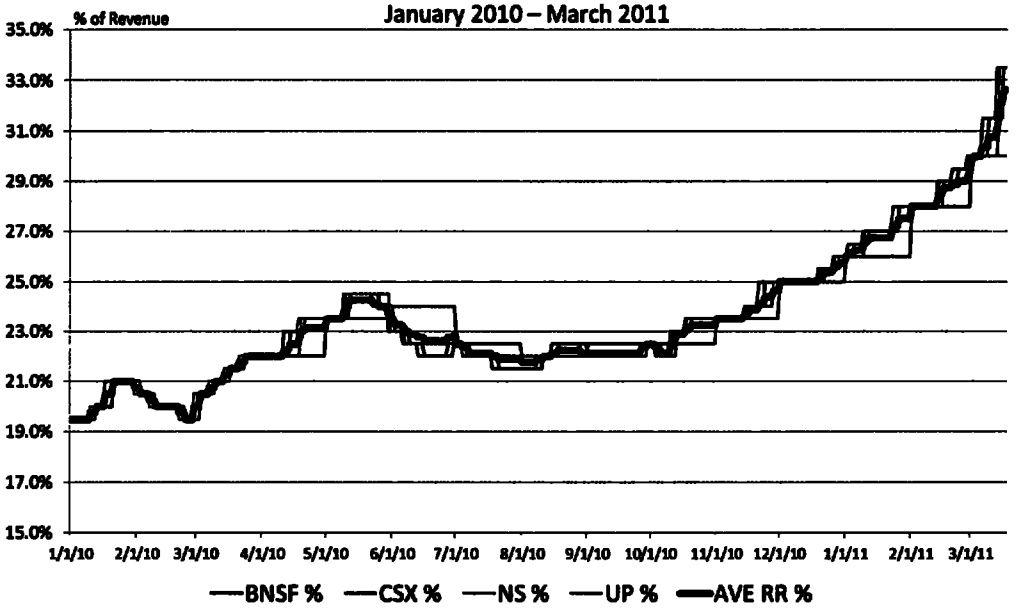
The next element of our study was to look at the railroad percentage-of-revenue fuel surcharge programs. Using information either publicly available or available from the railroad directly:

- http://www.bnsf.com/customers/fuel-surcharge;
- http://www.csxi.com/?fuseaction=customers.fuel;

- http://www.nscorp.com/nscintermodal/Intermodal/News/Newsitems/news032911.html
- http://www.uprr.com/customers/surcharge/index.shtml
- http://rsilogistics.com/newFuelSurchargesPage.aspx

The published intermodal fuel surcharge for the four of the Class I railroads (BNSF, CSX, NS and UP), which cover our study time period, can be seen on Chart 3:

CHART 3
INTERMODAL FUEL SURCHARGE PROGRAMS – BY RAILROAD
January 2010 – March 2011



In addition to the individual railroad fuel surcharge schedules presented on Chart 3, we have also created an "Average Railroad %" that attempts to show industry behavior rather than focus on any specific provider. When looking at the individual railroad schedules and comparing it to the Average Program we presented, we see very high correlations (BNSF=.995; CSX=.994; Norfolk Southern=.994 and; Union Pacific=.967). This highlights that the individual schedules are virtually

identical and allow us, for the remaining portion of our study, to use the Average Rail % as representative of the industry.

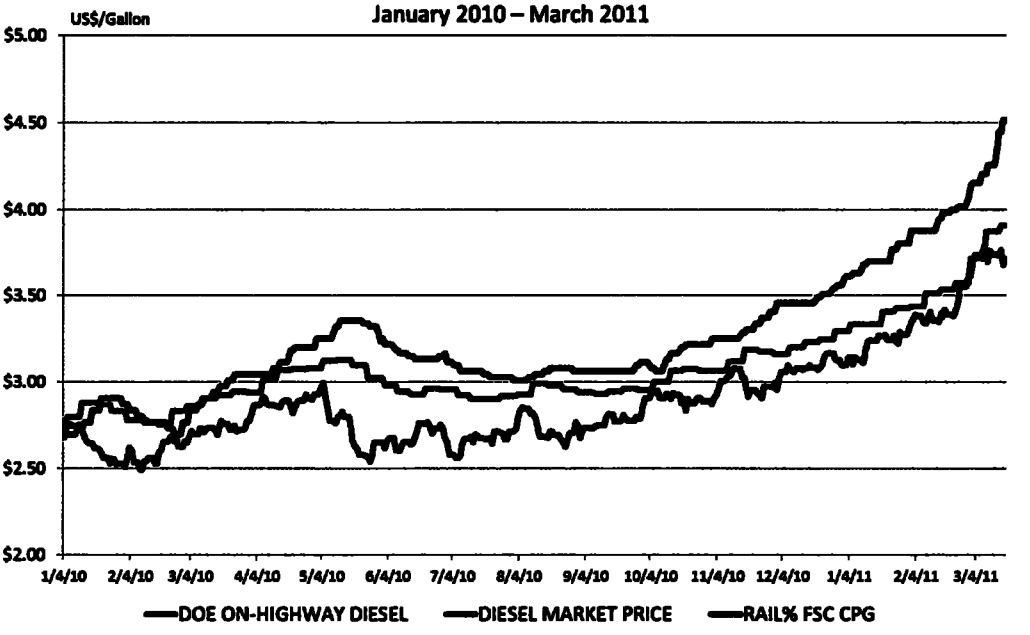
Our study next merged the fuel market information with the railroad fuel surcharge program average applied to the more than 184,000 freight movements referenced above.

As we do so, we see that the DOE and Diesel Market prices are pulled forward from the prior fuel market chart. We have now added the Rail FSC (fuel surcharge) converted to a cost-per-gallon. The cost-per-gallon is determined by using the industry standard intermodal fuel surcharge mileage (typically two-times the standard truckload schedule of 6mpg providing an intermodal industry standard of 12mpg) which we believe is still conservative based on rail industry comments about the efficiency of rail versus truck movements. Nonetheless, using this benchmark, we provide the comparison of fuel market prices to the Rail FSC cost-per-gallon on Chart 4.

CHART 4

DIESEL FUEL & RAIL% FUEL SURCHARGE PRICE BEHAVIOR

January 2010 – March 2011



Note in regard to the data on Chart 4:

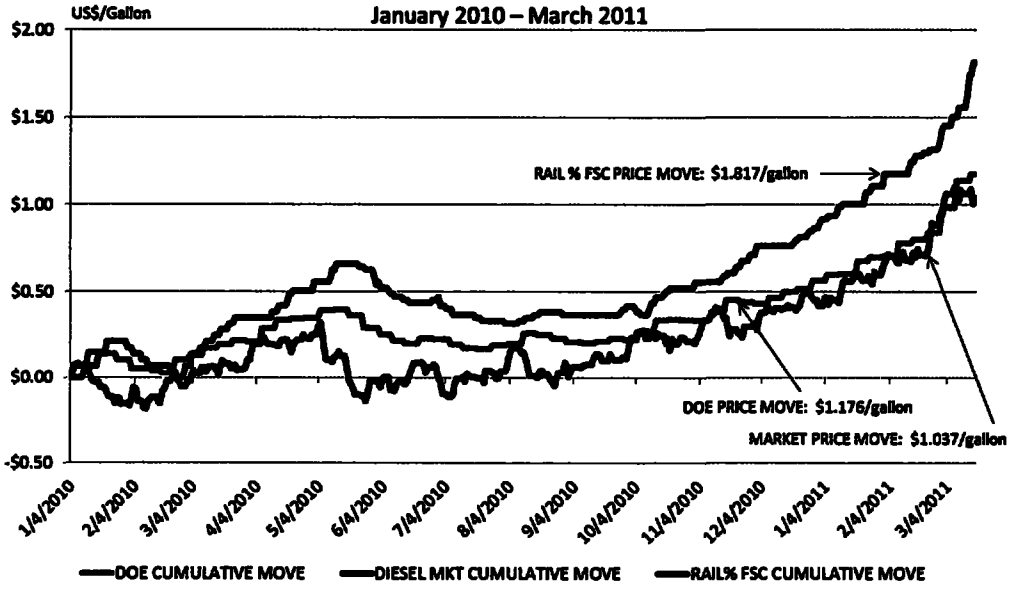
- The cost-per-gallon presented in the Rail FSC CPG is based entirely on the fuel cost provided by the surcharge itself. This is as if no fuel costs were embedded in the base linehaul rates. To the extent that they are, would increase the cost-per-gallon as presented.
- As the fuel market escalates, the Rail FSC CPG accelerates at an increasing pace.

As we look deeper at the study time period – and the resulting changes in fuel prices – we see:

- The DOE Index increased by $1.176/gallon over this time period.
- The Diesel Market Price increased $1.037/gallon; however, the Rail % Fuel Surcharge increased $1.817/gallon over the same period.

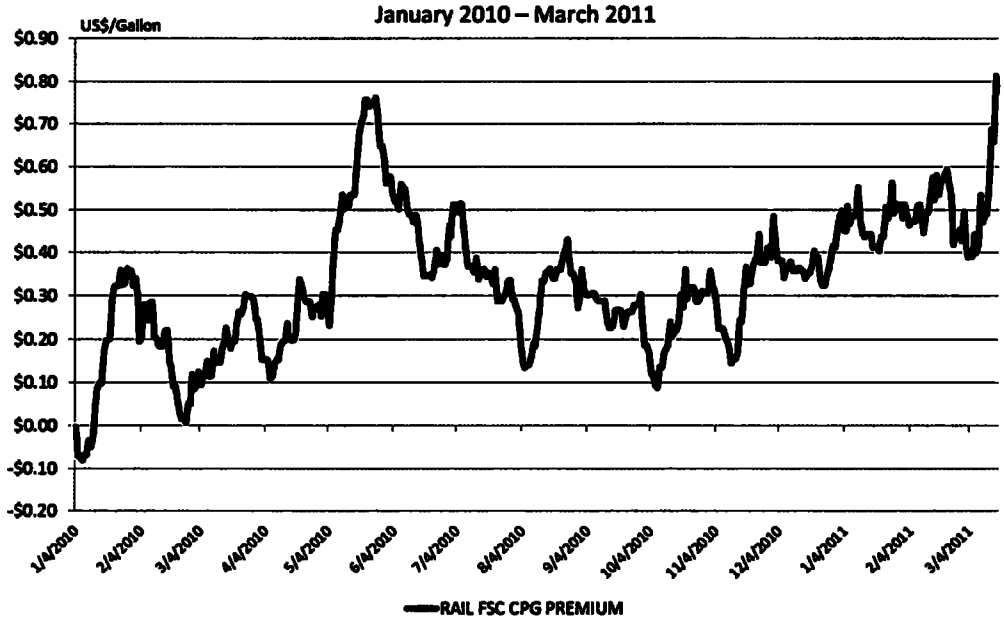
We can see this price behavior – or the cost-per-gallon changes – by each of these benchmarks on Chart 5:

CHART 5
DIESEL FUEL & RAIL% FSC PRICE CHANGE BEHAVIOR
January 2010 – March 2011



In addition, looking at the relationship indicated by the price changes, we can see the distortion presented by the railroad industry's percentage of revenue fuel surcharge programs. As Chart 6 highlights, the variance between the DOE Index diesel fuel pricing and the Rail Average fuel surcharge pricing ranged between minus $0.08/gallon to a positive $0.81/gallon dependent on the day and what was occurring in the fuel market at that time.

CHART 6
RAIL INTERMODAL % OF REVENUE FSC PRICE PREMIUM
January 2010 – March 2011



Perhaps the most significant finding from the study is the gap that exists between the actual fuel market and the charges for fuel applied by the railroads. We believe this not only prevents effective decision making by all parties involved in such transactions but also creates economic distortion that can be harmful to the interests of all parties in such transactions.

Shippers are not only exposed to costs unrelated to their freight movements but, also, suffer a disconnect between what they are being charged by the intermodal providers and what they can reasonably expect to be reimbursed by their marketplace. Since shippers are exposed to the market and information about changes in fuel prices, it is unlikely that their customers will allow this premium to be recaptured.

From the perspective of the railroads and intermodal providers, this lack of transparency and economic distortion may result in shippers failing to choose to move their freight via intermodal when it is in the shippers' best interests, and the best interests of the nation, that the shippers choose intermodal. This ultimately hurts the competitive position of intermodal and what would otherwise be a rational mode shifting.

How Do Alternatives to the Fuel Surcharge Enter the Marketplace?

BTF's alternative to the fuel surcharge, BTF's Fuel Recovery Program, was introduced to truckload and intermodal markets as a component of a shipper's annual or periodic request for proposal ("RFP") from incumbent and other carriers or third parties. Several of the early RFPs for truckload, which included BTF's Fuel Recovery Program, encountered verbal push back from one or another of the larger truckload carriers. In some instances larger truckload carriers declined to respond to RFPs which included BTF's Fuel Recovery Program. In several instances, BTF learned of efforts by fuel providers to encourage resistance to the

BTF Fuel Recovery Program and to discourage participation in the direct fueling component of options offered by BTF.

The competitive balance within the truckload sector is such even those larger truckload carriers who may choose to withhold their capacity to protect their fuel surcharges have not been able to withhold sufficient capacity to block the success of RFPs including BTF's alternative to the fuel surcharge.

In *Rail Fuel Surcharges*, STB Ex Parte No. 661, decision 1/25/2007, the Board found that most railroads opposed requiring fuel surcharges to be more closely linked to fuel costs and "vigorously" objected to a proposal that the Board partially revoke the class Exemptions to extend the fuel surcharge measures the Board adopted to various categories of rail traffic subject to the Exemptions. *Id.,* pp. 3 and 5. The Board found:

> The railroads question the practicality of alternatives to rate-based fuel surcharge programs. Many assert that a fuel surcharge based on mileage would be difficult, time consuming, and expensive to implement and administer. But these assertions are largely unsupported.

Id., p. 8. It seems likely, however, that such resistance by the railroads was based on vested interests in preserving the revenue value of rate-based fuel surcharges.

In contrast to the truckload motor carriers, however, consolidations of Class Is combined with the Exemptions puts the Class Is in a far better position to resist marketplace alternatives to indexed fuel surcharges, if they or even one of the larger Class Is chooses to do so. Because the

Nation's Rail Network operates as a system, even if just one Class I rejects use of alternatives to fuel surcharges, access by shippers to alternative, transparent means of paying for the fuel consumed to get their products to market can be severely limited.

An investigation of the extent and pace at which the Class Is, since 2007, have adopted mileage-based fuel surcharges for exempted traffic may be indicative of their level of resistance and the extent to which competition, alone, is capable or incapable of requiring them to adapt to changes in the marketplace such as the availability of alternatives to indexed fuel surcharges.

FSC Alternatives Provide a Path to Greater Competitive Access and Easing the Burden of Differential Pricing Without Impairing the Financial Health of the Railroad Industry.

Transparency in fuel pricing, because of the energy efficiency potential of rail, in general, with no other changes to the Board's access rules and policies, will enhance competitiveness in the railroad industry simply by enabling shippers to see the energy advantages of rail. That potential for increasing rail market share for non-captive, high value merchandise freight – whether through truck-rail intermodal or truckload-boxcar competition – which contributes to railroad industry going concern values, will tend to reduce the contribution share required from differential pricing of captive freight. The relatively small current market share of the railroad industry for non-captive freight, both via truck-rail intermodal and carload competition, implies that even a relatively small increase in rail

market share arising from increased energy life cycle transparency may have a dramatic impact on the burden currently borne by captive freight with little risk of impairing the bottom line financial health of the railroad industry. Similarly, triggering greater shipper access to alternative through routes, terminal facilities options, reciprocal switching and bottleneck pricing for movements on which energy savings is accurately identified through energy life cycle transparency, will further enhance the effectiveness of enabling shippers to incorporate energy consumption into supply chain decisions and rail industry competitiveness overall.

Thus, greater access and competitiveness for captive freight need not be a zero sum game. Energy life cycle transparency creates a pathway to increased competitiveness for both shippers and railroads, minimizing risk to the financial health of the railroad industry from easing the Board's access rules and policies.

The Board's facilitating such change is mandated by core elements of the national Rail Transportation Policy are: 49 USC § 10101(1), rate competitiveness; (4), system competitiveness, (5) coordination among modes; (8), health and safety of air emissions; and (14), energy conservation.

CONCLUSION AND REQUESTED ACTION

Consolidation of the Class Is, the history of the industry adoption of essentially uniform rate-based fuel surcharges and the railroads' resistance to alternatives to rate-based fuel surcharges, together with the

emergence of demonstratively viable marketplace alternatives to indexed fuel surcharges, generally, warrant investigation by the Board. The Mercury Group very much prefers a transportation marketplace that is sufficiently competitive to assure that the railroads are receptive to and readily adapt to marketplace alternatives to indexed fuel surcharges. However, the reality of marketplace inertia and the fact that resistance by even one of the Class Is is likely to severely limit effective use of alternatives to indexed fuel surcharges, warrants regulatory intervention.

The Mercury Group requests that the Board institute a sub-numbered proceeding in this Docket and, jointly, with proceedings in *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, Docket No. EP 704, to specifically investigate the implications and impacts of indexed fuel surcharges including: (1) adverse impacts of indexed fuel surcharges on energy life cycle transparency and their relationship to the potential impacts of changes in the Board's access rules and policies and access pricing; (2) nimbleness of the railroads adaptation or their resistance to marketplace alternatives to indexed fuel surcharges; (3) requiring railroads to separately identify the fuel cost component of their base rates; and (4) any other considerations regarding energy life cycle transparency that may facilitate changing the Board's access rules and policies to increase rail-to-rail competition and that may be necessary to carry out the national Rail Transportation Policy .

Dated this 8th day of April, 2011.

Verification

I, Craig S. Dickman, the Chief Executive Officer of Breakthrough Fuel, LLC ("BTF"), whose principal place of business, 1385 West Main Avenue, DePere, Wisconsin, 54115, hereby affirm and verify that I have read the foregoing Comments of The Mercury Group, know the facts stated therein to be true and correct to my own knowledge and, as to those stated upon information and belief, I reasonably believe them to be true and correct.

Craig S. Dickman

STATE OF WISCONSIN)
) SS
BROWN COUNTY)

Personally came before me this 7th day of April, 2011, the above named Craig S. Dickman, personally known to me to be the person who executed the foregoing verification and acknowledged the same.

Notary Public, State of Wisconsin

My commission 3/1/2015.